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No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,
Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS AND THE NATIONAL CRIME VICTIMS BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE AVAILABILITY OF A POST-DEPRIVATION STATE TORT REMEDY DOES NOT SATISFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS 4

II. STATE TORT SUITS ARE AN INADEQUATE REMEDY FOR DEPRIVATION OF THE ENTITLEMENT CREATED BY MANDATORY ARREST STATUTES 7

A. Tort Law's Focus on Compensation for the Harms of Violence Rather than on Pre-Deprivation Process Renders Its Remedies Structurally Inappropriate for the Type of Injury Suffered in This Case. 7

B. Doctrinal Hurdles Render Tort Suits Ineffective as a Remedy for Erroneous Deprivation of Enforcement of a Protection Order. 10

C. The Colorado General Assembly Recognized the Inadequacy of Its Tort Law in Establishing an Entitlement Under § 18-6-803.5(3)(b) Deserving of Pre-Deprivation Due Process. 13

III. THE INADEQUACY OF STATE REMEDIAL SCHEMES NECESSITATES A FEDERAL REMEDY. 16

A. Finding a § 1983 Claim Where State Tort Law Is Deficient Is Consistent with the Legislative Intent of § 1983 16

B. Federal Law Often Recognizes a Property Interest Even When State Tort Law Provides No Adequate Remedy for Deprivation of That Interest. 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Albright v. Oliver, 510 U.S. 266 (1994) 6

Baldwin v. Reese, 541 U.S. 27 (2004) 4

Bell v. Burson, 402 U.S. 535 (1971) 18

Bisbee v. Bey, 39 F.3d 1096 (10th Cir. 1994) 18

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 16, 18

Daniels v. Williams, 474 U.S. 327 (1986) 19

Fuentes v. Shevin, 407 U.S. 67 (1972) 7

Goldberg v. Kelly, 397 U.S. 254 (1970) 18

Hook v. Lakeside Park Co., 351 P.2d 261 (Colo. 1960) 12

Leake v. Cain, 720 P.2d 152 (Colo. 1986) 12

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 5, 11, 18

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) 18

Mitchum v. Foster, 407 U.S. 225 (1972) 17

Monroe v. Pape, 365 U.S. 167 (1961), *overruled by Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) 4, 5, 17

Parratt v. Taylor, 451 U.S. 527 (1981) 5

Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982) 17

Perry v. Sindermann, 408 U.S. 593 (1972) 18

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) 18

Potter v. Thieman, 770 P.2d 1348 (Colo. Ct. App. 1989) 12

Rohrbough v. Stone, 189 F. Supp. 2d 1088 (D. Colo. 2001) 11

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 16

Ruegsegger v. Jefferson County Board of County Commissioners, 197 F. Supp. 2d 1247 (D. Colo. 2001) 11

Smith v. State Compensation Insurance Fund, 749 P.2d 462 (Colo. Ct. App. 1987) 12

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 15

Whitcomb v. City & County of Denver, 731 P.2d 749 (Colo. Ct. App. 1986) 12

Wilson v. Garcia, 471 U.S. 261 (1985) 4, 17

Zinermon v. Burch, 494 U.S. 113 (1990) 4, 6, 7, 11

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. VI, § 2 15

42 U.S.C. § 1983 ..... *passim*

Colo. Rev. Stat. § 18-6-803.5(3)(b) 13, 14, 15, 19

Colo. Rev. Stat. § 18-6-803.5 3

Colo. Rev. Stat. § 18-6-803.5(5) 14

Colo. Rev. Stat. § 24-10-101 *et seq.* 15

Colo. Rev. Stat. § 24-10-118(2) 11

LEGISLATIVE MATERIALS

Hearings on House Bill 1253 Before the House Comm. on the Judiciary (Colo. Feb. 15, 1994) 13

MISCELLANEOUS

Andrea Brenneke, *Civil Rights for Battered Women: Axiomatic and Ignored*, 11 Law & Ineq. 1 (1992) 8, 10

Erwin Chemerinsky, *Federal Jurisdiction* (3d ed. 1999) 17

Donna Coker, *Crime Control and Law Reform in Domestic Violence Law: A Critical Review*, 4 Buff. Crim. L. Rev. 801 (2001) 9

Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J. of L. & Feminism 3 (1999) 14

Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843 (2002) 10

Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 Tul. L. Rev. 167 (2004) 8

Jennifer Wriggins, *Domestic Violence Torts*, 75 S. Cal. L. Rev. 121 (2001) 8

INTERESTS OF *AMICI CURIAE*[1]

The National Association of Women Lawyers, headquartered in Chicago, is the oldest women's bar association in North America. Founded in 1899, the Association promotes the interests of women and families, as well as women in the legal profession.

The Association has filed as *amicus curiae* in the Supreme Court of the United States, as well as in the highest courts of many states. The Association has a strong interest in protecting the legal rights of women and girls and strongly supports the rights of women to seek recourse in the courts for protection from domestic violence and abuse. For that reason, the National Association of Women Lawyers files as *amicus curiae* in this matter to help promote access to justice for all women, particularly those who are victims of domestic violence and abuse.

The National Crime Victim Bar Association (NCVBA) is a specialty practice bar for attorneys who represent victims of crime in civil tort claims against both intentional tortfeasors and negligent third parties. The NCVBA is comprised of approximately 250 plaintiffs' attorneys in forty-three states and the District of Columbia. The organization publishes a quarterly law journal, Victim Advocate; a case reporter, Crime Liability Reporter; and offers continuing legal education programs to improve the quality of legal practice in this area of the law. The NCVBA also works to increase awareness among crime victim advocates and other professionals of the civil remedies available to victims of crime. The NCVBA is particularly interested in this brief

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[1] The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. None of the parties authored this brief in whole or in part, and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

because of the organization's commitment to victims of domestic violence, stalking, sexual assault, child abuse, and all others who are granted orders of protection. The NCVBA's membership collectively has many decades of experience in representing these victims of crime in tort claims and can attest to the insufficiency of the available state tort remedies in this case.

SUMMARY OF ARGUMENT

Procedural due process cannot be satisfied in this case by post-deprivation tort remedies in Colorado state court. Petitioner and its *amici* wholly misapprehend the relationship between state tort law and federal due process jurisprudence, arguing both that Colorado tort remedies satisfy due process and also that the absence of a state tort corollary defeats Respondent's claim under 42 U.S.C. § 1983. Both arguments fail.

Post-deprivation remedies satisfy procedural due process only when two conditions are met. First, no viable pre-deprivation process can exist that could have prevented the harm. Second, the government's failure to provide process must be random and not the result of de facto state policy. Neither condition is satisfied in this case. Petitioner and its officers could have provided Respondent with an informal hearing before denying her entitlement to enforcement of the court's restraining order. Their failure to do so was the result of a policy of unresponsiveness to victims of violence. Accordingly, post-deprivation relief cannot fulfill the government's constitutional obligation to provide due process.

Conversely, the inadequacy of state tort law does not somehow demonstrate that no entitlement to enforcement exists, contrary to the alternative argument made by Petitioner and its *amici*. In fact, Congress enacted § 1983 for the very purpose of providing a federal claim when state

courts were complicit with local failures to prevent violence. Furthermore, property interests in government services almost always lack a corresponding state tort claim to compensate persons when those interests are deprived. Thus property interests can exist absent a state tort correlative.

The relationship between state tort law and federal due process jurisprudence in this case is far simpler than the version concocted by Petitioner. Tort law has for years proven inadequate as a deterrent against police indifference towards victims of violence. Petitioner's refusal to give reasoned consideration to Respondent's pleas for enforcement of her protection order is precisely the type of governmental inaction that motivated the Colorado General Assembly to pass a mandatory arrest statute.

The Colorado General Assembly enacted that statute, Colo. Rev. Stat. § 18-6-803.5, in response to a state and system-wide failure to provide effective protection to victims of domestic violence. Common law schemes did not provide the proper motivation, nor impose a sufficient legal duty upon the police to respond to calls for assistance by victims of violence. Tort suits against police and local governments failed to limit the social costs of violence and focused on compensation following violence rather than procedural protection to guard against violence in the first instance. This Court should follow the Assembly's intention in creating a mandatory duty to enforce a valid restraining order by holding that victims of violence are entitled to due process before the police can deprive them of their entitlement to enforcement.

ARGUMENT

I. THE AVAILABILITY OF A POST-DEPRIVATION STATE TORT REMEDY DOES NOT SATISFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS.

The availability of a post-deprivation state tort suit against the police does not fulfill the state's duty to provide due process to a victim of domestic violence who has obtained a valid restraining order. Petitioner has previously argued that post-deprivation relief adequately serves a victim who is denied enforcement of restraining order. Although Petitioner has seemingly abandoned that argument before this Court and therefore waived it, *see Baldwin v. Reese*, 124 S. Ct. 1347, 1352 (2004), it is nevertheless important to note that post-deprivation relief does not satisfy the requirements of due process in this case.

As a general principle, the mere existence of an alternative tort claim does not bar a claim brought under § 1983. To hold otherwise could negate almost all such claims because "[a]lmost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action." *Wilson v. Garcia*, 471 U.S. 261, 272-73 (1985). Thus, this Court stated in *Zinermon v. Burch*, 494 U.S. 113 (1990), that "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Id.* at 124. This Court further noted that "[a] plaintiff, under *Monroe v. Pape*, may invoke § 1983 regardless of any state tort remedy that might be available to compensate him for the deprivation of these rights." *Id.* at 125 (citing *Monroe v. Pape*, 365 U.S. 167 (1961)); *see also Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and

refused before the federal one is invoked."), *overruled on other grounds by Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 664-689 (1978). Section 1983 must be read in this way, or state governments could immunize their officers from § 1983 liability simply by enacting, but not enforcing, general statutes prohibiting officers from violating the Constitution.

With respect to procedural due process claims in particular, Petitioner's reliance below on this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), is misplaced. In *Parratt*, this Court examined whether an official's negligent loss of a prisoner's property violated the prisoner's procedural due process rights given the existence of adequate post-deprivation procedural protections. *Id.* at 537. This Court concluded that post-deprivation process can satisfy procedural due process requirements in certain circumstances involving the loss of property, primarily where it is impractical to provide "a full and meaningful [pre-deprivation] hearing." *Id.* at 539-41. The mere fact that *some* remedy may be available later is insufficient, however. Such a post-deprivation remedy does not suffice for constitutional purposes if it does not provide "full compensation" for the loss. *Id.* at 543-44; *see also id.* at 540 ("The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.'") (internal citation omitted). As this Court stated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), a post-deprivation process is constitutionally inadequate if it does not "make the complainant entirely whole." *Id.* at 436-37.

Parratt is inapposite also because the very nature of the deprivation there made pre-deprivation process infeasible. It was impossible to predict that a prison guard would lose the

prisoner's property and therefore impractical to hold a hearing prior to the loss. Similarly, no pre-deprivation process was practicable when the complained-of conduct was "a random, unauthorized personal vendetta against the prisoner," *Zinermon*, 494 U.S. at 130 (citing *Hudson v. Palmer*, 468 U.S. 517, 521 (1984)), and not the result of state custom or policy. *See also Albright v. Oliver*, 510 U.S. 266, 285 (1994) (Kennedy, J., concurring) (stating that the *Parratt* rule applies only "where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act"). *Parratt*, then, applies only in the "unusual case" in which pre-deprivation safeguards are impossible to achieve because the deprivation is not the result of state custom or policy and is impossible to predict. *Zinermon*, 494 U.S. at 129.

In this case, as Respondent pleaded in her Complaint, the Petitioner's failure to enforce her restraining order was a consequence of policy; it was not random or isolated. In addition, the long history of police non-enforcement of valid restraining orders makes the deprivation of Respondent's interest in enforcement entirely predictable. *See Zinermon*, 494 U.S. at 136-37 (explaining that pre-deprivation process is required when context renders action resulting in erroneous deprivation entirely predictable). Furthermore, in this case, adequate pre-deprivation process by the police would have substantially reduced the risk of an erroneous deprivation of Respondent's right to enforcement of the objective terms of the court order protecting Respondent and her children against her abusive husband. At the very least, the police could have provided Respondent with an informal "hearing" --in essence, a review of her complaint with the purpose of determining whether there was probable cause to believe that her estranged husband had violated the order--and notified her of their determination whether or not she met the criteria for mandatory arrest and what action they would take.

Petitioner's post-hoc suggestion that Respondent was not deprived of due process because she may now pursue a tort claim for negligence flies in the face of this Court's statement that, "[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Id.* at 132.

II. STATE TORT SUITS ARE AN INADEQUATE REMEDY FOR DEPRIVATION OF THE ENTITLEMENT CREATED BY MANDATORY ARREST STATUTES.

A. Tort Law's Focus on Compensation for the Harms of Violence Rather Than on Pre-Deprivation Process Renders Its Remedies Structurally Inappropriate for the Type of Injury Suffered in This Case.

As this Court has observed, in most instances only pre-deprivation process--as opposed to a post-hoc damage award --can truly protect against wrongful deprivation of an entitlement:

> If the full right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it may be undone."

Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1972)).

The imperative of affording pre-deprivation process is particularly compelling in this setting, given the substantial

risks posed by erroneous deprivation. The failure by police to undertake the enforcement promised by mandatory arrest statutes inevitably compounds the magnitude of domestic violence and helps ensure its repetition. The costs of this violence are real and manifold: physical injury, lasting psychological harm, and economic effects due to lost short- and long-term earning potential. Andrea Brenneke, *Civil Rights for Battered Women: Axiomatic and Ignored*, 11 Law & Ineq. 1, 3 (1992) (cataloguing the injuries associated with domestic violence).

The consequences of domestic violence are so pervasive that its victims can never be made fully whole. Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 Tul. L. Rev. 167, 177-81 (2004) (concluding that for victims of domestic violence, "[r]estitution is not likely ever to be sufficient to ensure full victim compensation"). This case provides a tragic illustration: what damage award can truly make Respondent whole for the loss of her children?[2] As empirical evidence has shown, when faced with legal regimes that do not effectively combat police failure to enforce restraining orders, most victims of domestic violence opt not to seek such post-deprivation remedies at all. Jennifer Wriggins, *Domestic Violence Torts*, 75 S. Cal. L. Rev. 121, 133-44 (2001).

Procedural due process doctrine thus represents a superior structure for protecting victims because its focus on property rights in enforcement leads to more consistent compliance with mandatory arrest statutes. By creating an entitlement to enforcement of restraining orders, these

[2] *Amici* acknowledge that the ultimate goal of Respondent's suit under § 1983 is to recover money damages as compensation for the deprivation of process and consequent deaths of her children. However, that fact does not detract from the importance of pre-deprivation process in the enforcement of protection orders.

statutes have focused the attention where it belongs: on police failure to provide citizens with the enforcement that they have been promised. Only process carried out prior to any deprivation of this entitlement effectively addresses and avoids the persistent failure of the police to act to protect domestic violence victims that motivated passage of the statute.

Enforcement of domestic violence mandatory arrest statutes through a focus on pre-deprivation procedure promises better police compliance for three reasons. First, the duties placed on local governments and their police departments are clear and can be readily met. Upon receiving a request to enforce a restraining order, police need provide only an informal "hearing" to the complainant in order to determine whether probable cause exists that a violation has occurred. Faced with a choice between possible § 1983 liability and compliance with these straightforward procedures, police are likely to opt for the latter.

Second, recent studies show that legal regimes focusing on the provision of adequate procedural treatment by police (rather than just compensating the victims injured by wrongful police inaction) are much more successful in ultimately encouraging victims of violence to work within the system. *See* Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 Buff. Crim. L. Rev. 801, 857 n.223 (2001) (citing *Family Protection and Domestic Violence Intervention Act of 1994: Evaluation of the Mandatory Arrest Provisions, Third Interim Report to the Governor and the Legislature* 53 (Oct. 2000) (available from the State of New York, Division of Criminal Justice Services) (interviews with battered women demonstrating that "[o]ne of the most powerful factors that seemed to determine victim satisfaction with the police was the manner in which the police treated the victim.")).

Improved cooperation between victims and the police ultimately limits the social costs of domestic violence and improves the deterrent effect intended by mandatory arrests statutes. Furthermore, by increasing victims' satisfaction with the system, it reduces the overall number of lawsuits filed against the police, minimizing municipal liability.

Finally, treating failure to enforce restraining orders as a problem of constitutional dimensions sends a strong and necessary message: domestic violence is not merely a matter of private violence but one that requires the application of public law. Brenneke, 11 Law & Ineq. at 22. Drawing attention to domestic violence as an issue of broad public concern thus promises to bring increased attention and lead to improved enforcement efforts and a reduction in domestic violence overall. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1865 (2002) ("In the criminal justice system, mandatory policies represent an important symbolic shift; a declaration that the state no longer tolerates violence against women. Such policies force officials to take domestic violence seriously and protect victims. . . .") (footnote omitted).

B. Doctrinal Hurdles Render Tort Suits Ineffective as a Remedy for Erroneous Deprivation of Enforcement of a Protection Order.

Colorado state tort law also does not provide the process that is constitutionally required in this case, contrary to the assertions of Petitioner's *amici* and the dissenting opinion below. *See, e.g.*, Br. of *Amicus Curiae* United States of America at 25-26; Pet. App. 87a-88a n.19 (O'Brien, J., dissenting). "Seeking redress through a [state] tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely

whole." *Logan*, 455 U.S. at 436-37. In particular, two doctrinal hurdles undermine Colorado plaintiffs' ability to hold police officers liable for wrongful noncompliance with the mandatory arrest statute, thus leaving plaintiffs without meaningful tort remedies.

First, under Colorado sovereign immunity law, recovery in tort against a police department for the failure of its officers to enforce restraining orders requires a heightened showing of intent. Plaintiffs must show that the defendants' behavior amounted to "willful and wanton" conduct with respect to the substantive harm alleged--here, the deaths of Ms. Gonzales's children. *See* Colo. Rev. Stat. § 24-10-118(2).[3] Indeed, Colorado's courts have frequently rejected state law tort suits alleging that wrongful police inaction that eventually led to criminal conduct was sufficiently "willful and wanton" to overcome qualified immunity. *See Ruegsegger v. Jefferson County Bd. of County Comm'rs*, 197 F. Supp. 2d 1247, 1265 (D. Colo. 2001) (finding that police failure to enter school that was occupied by assailants was not willful and wanton conduct); *Rohrbough v. Stone*, 189 F. Supp. 2d 1088, 1096-98 (D. Colo. 2001) (finding that police

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[3] In contrast, to allege a procedural due process claim under § 1983 theory, a plaintiff such as Ms. Gonzales need demonstrate only that the officers had a "willful and wanton" state of mind with respect to depriving her of her right to adequate process prior to denial of enforcement of her restraining order. *See Zinermon*, 494 U.S. at 137 (explaining that an allegation that state officials allowed an incompetent patient to "voluntarily" commit himself in "willful, wanton, and reckless disregard of his constitutional rights . . . means only that petitioners disregarded their duty to ensure that the proper procedures were followed, not that they . . . were bent on effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards"); *Logan*, 455 U.S. at 436 (distinguishing the injury in § 1983 due process cases--deprivation of process inflicted by "established state procedure"--from the substantive harm eventually caused by that deprivation) (quotation marks and citation omitted).

failure to attempt rescue of besieged students who placed 911 call was not willful and wanton conduct); *Whitcomb v. City & County of Denver*, 731 P.2d 749, 751-52 (Colo. Ct. App. 1986) (finding that police officers' refusal to assist stranded motorist who was later assaulted was not willful and wanton conduct).

Second, the element of causation impedes the effectiveness of state tort suits as enforcement mechanisms for encouraging police responsiveness. The question of causation turns on foreseeability. *See Hook v. Lakeside Park Co.*, 351 P.2d 261, 265-66 (Colo. 1960). Under Colorado tort law, even if a defendant has acted wrongfully, no tort liability attaches to the wrongful conduct if the injury of which the plaintiff complains could not have been reasonably foreseen by the defendant. *See, e.g., Smith v. State Comp. Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987) (finding no liability for negligent conduct where injury was not reasonably foreseeable). Because the injury in a domestic violence case results in part from the intervening violent act of the abuser, the link between police nonfeasance and the ultimate harm may be attenuated. The number of causal steps separating the initial wrongful act (police inaction) from its ultimate effect (domestic violence by another wrongful actor) raises doubts as to whether the injury at issue could reasonably have been foreseen. Indeed, courts have been reluctant to conclude that police inaction is the legal cause of criminal behavior. *See Leake v. Cain*, 720 P.2d 152, 160-61 (Colo. 1986); *Potter v. Thieman*, 770 P.2d 1348, 1351-52 (Colo. Ct. App. 1989); *Whitcomb*, 731 P.2d at 751-52.[4]

[4] In contrast, on a § 1983 procedural due process theory, proving causation in this context is relatively straightforward. An immediate causal relationship exists between police inaction and the harm suffered--that is, deprivation of a property interest without procedural due process. The police failed to provide Respondent with a determination akin to a hearing prior to arbitrarily denying her enforcement of a restraining order. Their inaction was the direct and immediate cause of her being deprived the right to enforcement of her restraining order. Thus, the connection between police inaction and harm is direct and clear.

Because the state tort claim available to individuals who have been deprived of their entitlement to enforcement of their restraining orders is unlikely to provide meaningful relief, the post-deprivation tort remedy does not provide the process that is constitutionally due to individuals like Respondent.

C. The Colorado General Assembly Recognized the Inadequacy of Its Tort Law in Establishing an Entitlement Under § 18-6-803.5(3)(b) Deserving of Pre-Deprivation Due Process.

The Colorado Assembly passed a mandatory arrest statute because it saw that the then-existing system was failing victims of violence. Representative Kearns, sponsor of the bill, stated in support of the legislation that "the entire criminal justice system must act in a consistent manner, *which does not now occur*. The police must make probable cause arrests." *Hearings on House Bill 1253 Before the House Comm. on the Judiciary* (Colo. Feb. 15, 1994) (statement of Rep. Kearns, sponsor) (emphasis added). Thus, the Assembly implicitly recognized the ineffectiveness of common law tort remedies in encouraging police responsiveness.

The Colorado Assembly could have focused on improving after-the-fact tort remedies--for example, by creating an exception to the sovereign immunity of public entities and officers when they fail to enforce restraining orders--but wisely chose a different approach. Instead, the Assembly chose a police enforcement and prevention

strategy. The central feature of the Colorado legislature's focus on enforcement and prevention was its decision to phrase § 18-6-803.5(3)(b) in mandatory terms, eliminating police discretion to enforce restraining orders, and thus creating an entitlement to enforcement when such orders are issued that enjoys constitutionally protected status. Colorado thus chose to follow a national trend of state legislative action to remedy police inaction and judicial inefficacy in providing effective remedies to victims of violence. *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J.L. & Feminism 3 (1999) (detailing the history of state legislative action to curb domestic violence combined with police and judicial failure to enforce state legislation). The Assembly also included a provision immunizing police from wrongful arrest suits for overzealous enforcement of restraining orders. Colo. Rev. Stat. § 18-6-803.5(5). The Colorado lawmakers thus sought to reframe domestic violence law to entitle victims to enforcement of valid restraining orders, mandating that police take action to prevent injuries, rather than assuming that such prevention could be ensured by tort claims against the police after violence had occurred.

Petitioner argues that the sovereign immunity from tort suits enjoyed by Colorado's public officials and entities, which limits plaintiffs to recovery for "willful and wanton" conduct, implies that Colorado could not have intended to create an entitlement to enforcement that would permit a federal remedy more far-reaching than that permitted by state tort law. Pet'r's Br. at 27. This argument fails for several reasons. Petitioner fundamentally misapprehends the motive of the Assembly in passing § 18-6-803.5(3)(b). Had Colorado intended for this statute to be enforced through post-deprivation tort suits, then the Assembly would have amended the state's Governmental Immunity Act (GIA),

Colo. Rev. Stat. §§ 24-10-101, *et seq.*, to specifically exempt officers who failed to enforce mandatory restraining orders. That Colorado did not alter its own tort law indicates that the state intended for the mandatory restraining order statute to create not a right of recovery for damage caused by police nonfeasance under its own common law, but rather a pre-deprivation property right enforceable by means apart from a tort claim--- in all likelihood, through § 1983.

The implausibility of Petitioner's interpretation of the legislative history of § 18-6-803.5(3)(b) is further illustrated by its inconsistency with two basic canons of statutory construction. First, the GIA cannot be reasonably construed to operate as a limit on recovery via federal civil rights actions. On the contrary, such a result would suggest that state law limits recovery under federal statutes, and would thus run afoul of the federal Constitution's Supremacy Clause. U.S. Const. art. VI, § 2. This Court has consistently rejected interpretations of statutes that would render them unconstitutional. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994). Tellingly, Petitioner cannot identify a single case in which Colorado's state sovereign immunity statute has been invoked to limit recovery in a § 1983 procedural due process action. *See* Pet. App. 25a n.12 (citing state and federal cases illustrating this point).

Second, Petitioner's argument fails also because it would interpret § 18-6-803.5(3)(b) in a way that would add nothing to the enforcement regime that existed before its passage. Prior to passage of Colorado's restraining order statute, the only enforcement mechanism available to plaintiffs harmed by police inaction was a post-deprivation tort suit. Unless § 18-6-803.5(3)(b) is interpreted to create something meaningfully different--i.e., a property right that can serve as the predicate for pre-deprivation relief--it will function in a manner effectively indistinguishable from the previous

regime. That result is absurd and emasculates the statute. Indeed, this Court has rejected interpretations of statutes that render them redundant with earlier statutes. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 526-27 (1981).

III. THE INADEQUACY OF STATE REMEDIAL SCHEMES NECESSITATES A FEDERAL REMEDY.

Congress enacted § 1983 precisely to provide a federal remedy when, as here, state remedies proved inadequate. Petitioner asserts, without support, that the absence of an adequate state tort remedy necessarily means that there can be no federal remedy. *See* Pet'r's Br. at 27. Petitioner misapprehends the relationship between state tort law and federal due process jurisprudence. In fact, federal law regularly corrects deficiencies in state tort law on an interstitial basis, and the remedy or lack thereof accorded by common law tort jurisprudence is irrelevant to the existence of a *Roth*-style property interest. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (explaining that property interests are created by state law securing benefits and supporting claims of entitlement to those benefits). Colorado's mandatory arrest law, in combination with a court order mandating enforcement of that law against particular parties, creates a property interest independent of the tort relief a party might seek following an incident of violence. Accordingly, the fact that Colorado provides inadequate tort relief to victims of violence in fact supports, and does not detract from, the existence of a federal remedy.

A. Finding a § 1983 Claim Where State Tort Law Is Deficient Is Consistent with the Legislative Intent of § 1983.

Section 1983, originally enacted as one of six sections of the Ku Klux Klan Act of 1871, arose out of congressional concern about uncontrolled violence in the South and the

failure of state police and state courts to control that violence. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1985); *see also* Erwin Chemerinsky, *Federal Jurisdiction* § 8.2, at 454 (3d ed. 1999) (citing S. Rep. No. 42-1 (1871)). "It was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place. Congress therefore intended that the remedy provided in § 1983 be independently enforceable whether or not it duplicates a parallel state remedy." *Wilson*, 471 U.S. at 279 (footnote omitted). Congress further intended the statute as a basic alteration of the relationship between the federal government and the states. *See Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 502-03 (1982). This Court has stated that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people . . . to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (internal quotation marks and citations omitted).

In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court explained that § 1983 was intended to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." 365 U.S. at 173-74. It has been suggested, both by Petitioner and Judge O'Brien in his dissenting opinion in the Tenth Circuit, Pet'r's Br. at 27, Pet. App. 82a-83a, that the absence of an adequate state tort remedy should compel this Court to refrain from providing Respondent with a federal remedy under § 1983. Yet, this Court rejected just that view in *Monroe*. When the states fail to provide redress to victims of violence despite state statutes and court orders creating a right to such protection, a federal remedy is most needed. The failure of the police to engage in any process whatsoever before denying Respondent the right to enforcement of her restraining order is precisely the type of state action that § 1983 was intended to redress.

B. Federal Law Often Recognizes a Property Interest Even When State Tort Law Provides No Adequate Remedy for Deprivation of That Interest.

This Court made clear in *Roth* that property interests are created by state statutes securing certain benefits and supporting claims of entitlement to those benefits. 408 U.S. at 577. The derivation of *Roth* property interests is not a survey of state tort law, as implied by Petitioner. *See Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972) ("'[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.") (citing *Roth,* 408 U.S. at 577).

In fact, examples abound of property interests meriting pre-deprivation due process but lacking a correlating tort claim. *Compare, e.g., Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (recognizing property interest in public benefits), *with Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987) (holding that plaintiffs may not bring common law claims of tortious breach of contract and bad faith for improper termination of disability benefits because such claims are preempted by ERISA); *see also Logan*, 455 U.S. at 428 (recognizing a property interest in causes of action); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (recognizing a property interest in the right to operate a vehicle on state highways); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (finding a property interest in the receipt of government services); *cf. Bisbee v. Bey*, 39 F.3d 1096 (10th Cir. 1994) (in public-employment case, affirming district court order denying defendant's motion for summary

judgment on § 1983 claims and granting summary judgment on state tort claims). "It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." *Daniels v. Williams*, 474 U.S. 327, 333 (1986).

Just as the Due Process Clause should not be so stretched that it becomes "a font of tort law to be superimposed upon whatever systems may already be administered by the States," *id.* at 332 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)), so too must tort law not act as a proxy for those property interests whose deprivations must be preceded by procedural due process. As Judge Kelly stated in the Tenth Circuit en banc decision below, "whether *state* tort law would recognize a legal duty of care for which damages may be awarded is a wholly separate question from (1) whether the officers were bound by the order and could be held to answer in contempt for any violation, and (2) whether the terms of the order create a non-discretionary entitlement." Pet'r's App. 54a (Kelly, J., concurring in part and dissenting in part). Whether or not Respondent may succeed in a state tort suit against Petitioner has no relevance to the fact that she has adequately pleaded a procedural due process violation actionable under § 1983.

CONCLUSION

The existence of tort relief in Colorado does not and cannot provide due process to victims of violence who are deprived of their entitlement to enforcement of a valid restraining order. The Colorado General Assembly enacted § 18-6-803.5(3)(b) to create an entitlement in the enforcement of a restraining order precisely because the Assembly saw that compensation after the fact did not truly compensate victims nor deter domestic violence. In keeping with the intent of the Colorado Assembly, this Court should

affirm the decision of the Tenth Circuit in denying Petitioner's motion to dismiss.

Respectfully submitted,

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